Supreme Court, U.S.
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No. 91-157

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

TANDON CORPORATION,

Petitioner,

v.

QUANTUM CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

REPLY TO OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Petitioner, Tandon Corporation,[1] replies solely to the issues first raised in the brief in opposition of Respondent, Quantum Corporation, without waiver of any of the points already addressed in the petition.

I.

The Conflict Among the Circuits

A. The Federal Circuit's In Banc *Copeland's* Decision Supplanted the Opinions Cited by Quantum

Respondent Quantum errs in suggesting (Opposition at 10) that, today, the Federal Circuit would follow its deci-

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[1] See Petition p. ii for Rule 29.1 List.

sion in *Tenneco Resins, Inc. v. Reeves Bros., Inc.*, 736 F.2d 1508 (Fed. Cir. 1984). That decision was effectively removed as Federal Circuit precedent by the *in banc* decision in *Copelands' Enterprises, Inc. v. CNV, Inc.*, 887 F.2d 1065 (Fed. Cir. 1989). Under the rules of the Federal Circuit, a panel decision is the law of the circuit unless it is subsequently changed by the court *in banc*. *A.C. Aukerman Co. v. R.L. Chaides Construction Co.*, ____ F.2d ____, 18 U.S.P.Q.2d 1618 (Fed. Cir. 1991), *rehearing in banc granted* 935 F.2d 1262 (May 22, 91), *UMC Elec. Co. v. United States*, 816 F.2d 647, 652 n. 6, 2 U.S.P.Q.2d 1465, 1468 n. 6 (Fed. Cir. 1987), *cert. denied*, 484 U.S. 1025 (1988). "Once changed, however, all future panels are bound by the change." *Aukerman*, ____ F.2d at ____ 18 U.S.P.Q.2d at 1623.

The *dicta* in *Refac International, Ltd. v. IBM*, 798 F.2d 459 (Fed. Cir. 1986), cited by Quantum as indicating a willingness of the Federal Circuit to apply *Gillespie v. United States Steel Corp.*, 379 U.S. 148 (1964) (Opposition at 11), also was decided before *Copelands*, and no longer indicates that court's approach.

Thus, there is a clear conflict between the Federal Circuit's policy, as set forth in its *in banc Copeland's* decision, and the policy of several other circuits. That conflict requires resolution by this Court.

B. The Cases Cited by Quantum Do Not Show that *Gillespie* Is Still Applied in the Second, Fifth and Eighth Circuits

Quantum cites three cases purportedly showing that the Second, Fifth and Eighth Circuits still apply the guidelines of *Gillespie*. (Opposition at 11, n. 7). The cases cited do not show that.

In *John Doe Corp. v. John Doe Agency,* 850 F.2d 105 (2nd Cir. 1988), the Second Circuit determined that although the order in question was a discovery order, it was the final order in the case, "and the failure to embody the order in a separate judgment, *see* Fed.R.Civ.P. 58, will not prevent our exercising jurisdiction in light of the evident fact that no further proceedings in the district court were contemplated...." *Id.* at 108. The *Gillespie* doctrine was not at issue, was not decided and was not discussed in *John Doe.*

Federal Sav. & Loan Ins. Corp. v. Tullos-Pierremont, 894 F.2d 1469 (5th Cir. 1990), involved the issue of whether the time for appeal ran from entry of a summary judgment order as to appellant or from entry of final judgment as to all parties several months later. In dismissing the appeal as untimely, the Fifth Circuit cited *Gillespie,* not for application of the *Gillespie* doctrine, but merely for the proposition that a "final decision for the purposes of appealability is not necessarily the last order possible to be made in the case." *Id.* at 1475. The Fifth Circuit's *in banc* rejection of the *Gillespie* doctrine in *Newpark Shipbuilding & Repair, Inc. v. Roundtree,* 723 F.2d 399 (5th Cir. 1984), cited at page 13 of Tandon's Petition, is the law of that Circuit.

Likewise, the *Gillespie* doctrine was neither at issue nor the basis for the decision in *Farmland Industries, Inc. v. Frazier-Parrot Commodities, Inc.,* 806 F.2d 848 (8th Cir. 1986). Rather, the Eighth Circuit found it had jurisdiction under the collateral order doctrine of *Cohen v. Beneficial Industrial Loan Corp.,* 337 U.S. 541 (1949). Analyzing the last part of the *Cohen* test ("effectively unreviewable on appeal"), the court noted that the prospect of two complex trials if the *Farmland* appeal were to be dismissed was similar to the prospect presented in *Gil-*

lespie, where this Court found "that the cost of proceeding with the issues unanswered would be greater than the cost of immediately answering them." *Farmland*, 849 F.2d at 851.

C. The Fourth, Sixth, Ninth and Eleventh Circuit Cases Cited by Quantum Do Not Support Its Argument

Quantum also argues that there are cases in the Fourth, Sixth, Ninth and Eleventh Circuits in which *"Gillespie* appeals were refused." (Opposition at 12, n. 10) In the two cases correctly cited, the salient point is that the appeals were refused under the standards of *Gillespie*, not on the basis that the *Gillespie* doctrine is no longer applicable.

In deciding to dismiss the tax appeal in *Schrader v. C.I.R.*, 916 F.2d 361 (6th Cir. 1990), the Court of Appeals approvingly cited *Gillespie's* balancing test. Similarly, the appeal was dismissed in *Branson v. City of Los Angeles*, 912 F.2d 334 (9th Cir. 1990) where the Gillespie test was applied but not satisfied.

Miscott Corporation v. Zaremba Walden Co., 848 F.2d 1190 (11th Cir. 1988), only cites *Gillespie* for the basic proposition that the court of appeals does not have jurisdiction until the district court decision is "final". Applying a balancing test to a bankruptcy case, the Eleventh Circuit found that further fact finding was intertwined with the merits of the action and held that the district court's decision was not final. The Eleventh Circuit's decision does not represent a departure from *Gillespie*.

Harper v. Bowen, 854 F.2d 678 (4th Cir. 1988), was decided under the *Cohen* collateral order doctrine, not the *Gillespie* doctrine. *Id.* at 681. *Gillespie* was cited only in indicating that the Fourth Circuit was not inclined to

follow the Fifth Circuit's formalistic reading of the finality requirement of 28 U.S.C. § 1291. *Harper* at 681, n. 4.

II.
The Correct Test Is Not Whether a Judgment Was "Partial"

The *Gillespie* doctrine was applied in only one of the sixteen cases cited in Quantum's Opposition regarding the alleged impropriety of appeals from a grant of partial summary judgment. (Opposition at 13). In that case, *Clark v. Kraftco Corporation*, 447 F.2d 933 (2nd Cir. 1971), decided before *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978) and the Second Circuit's interpretation thereof (Petition, p. 12), the Second Circuit applied the *Gillespie* test and found no benefit in permitting an immediate appeal. None of the other cases cited by Quantum even mention *Gillespie*.

The correct test under *Gillespie* is not whether the judgment entered was partial or not, but rather (1) whether the appealed issues were conclusively determined, (2) whether they are fundamental to the further conduct of the case, and (3) whether an immediate appeal would reduce cost and inconvenience. Tandon's showing on these factors (Petition, pp. 20-23) stands unrefuted.

III.
Evidence of Settlements Is Irrelevant and Inadmissible

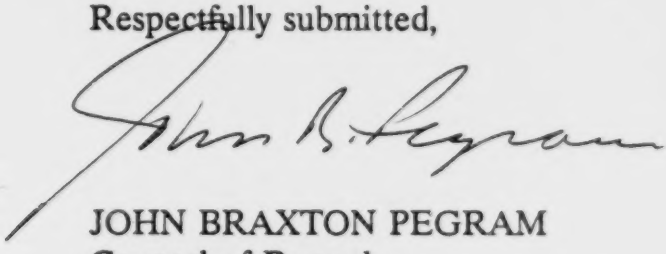
Tandon notes the repeated references in Quantum's Opposition to settlements with other parties. (Opposition at 5, n. 3, 14-15). In addition to the lack of any demonstrated relevance to the present petition, evidence of compromised claims is excluded by Rule 408 of the Federal Rules of Evidence. See *Alpex Computer Corp. v.*

Nintendo Co., No. 86 Civ. 1749 (KMW), 1991 U.S. Dist. LEXIS 9948 (S.D.N.Y. July 19, 1991), a very recent opinion in which Judge Wood reviews the application of Rule 408 to exclude evidence of patent litigation settlements.

CONCLUSION

For the reasons stated in the petition for writ of certiorari, and because Respondent has not overcome those reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,



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